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IN THE

Supreme Court of the United States

October Term, 1939

No. 676

HORTON C. RORICK,

Petitioner,

vs.

DEVON SYNDICATE, LIMITED, A CANADIAN CORPORATION,

Respondent.

On Certiorari from United States Circuit Court of Appeals, Sixth Circuit

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I. STATEMENT OF CASE

On January 19, 1930, the petitioner, a resident of Toledo, Ohio, filed suit in the Common Pleas Court of Lucas County, Ohio, against the respondent, a non-resi-

dent corporation, on a claim for Four Hundred Thousand Dollars ($400,000) with interest, under a written contract. Summons was immediately issued for the defendants (R. 2). An affidavit in attachment and garnishment was filed with the petition and orders of attachment and garnishment were issued and served pursuant thereto (R. 6).

On June 27, 1930, a second affidavit was filed describing other property of respondent and orders of attachment and garnishment were issued and served pursuant thereto (R. 12).

On October 10, 1930, an affidavit for constructive service was filed and service by publication commenced (R. 15).

On December 5, 1930, the respondent appeared specially and removed the case to the District Court (R. 18).

On January 15, 1931, The Spitzer Rorick Trust & Savings Bank filed its answer as garnishee, stating that it was indebted to the respondent on two special deposit accounts in the amounts of $9,255.95 and $20,258.42, respectively (R. 25).

On January 26, 1931, the respondent still appearing specially, moved the District Court for an order quashing and discharging the attachments (R. 26).

On February 17, 1936, before any disposition of the foregoing motion, and with leave of court (R. 28), petitioner filed a supplemental and amended petition (R. 29), together with a supplemental affidavit in garnishment (R. 33). The amended petition is identical to the original in all respects material to this appeal. The supple-

mental affidavit in garnishment, however, described in addition certain property of the respondent not previously attached.

On April 11, 1936, the respondent again appeared specially and moved the District Court for an order discharging the attachment and garnishment secured under the supplemental affidavit (R. 43).

On April 22, 1936, The Spitzer Rorick Trust & Savings Bank filed a supplemental answer as garnishee, reporting that it was holding the further sum of $17,576.08 pursuant to the attachment under the affidavit filed in the District Court (R. 44).

The District Court held that the affidavits in attachment and garnishment filed in the state court were void, because they were acknowledged before a notary public, who, in the court's opinion, was disqualified; that they could not be amended or validated by any proceedings in the District Court after removal. Said court further held that the attachment under the affidavit filed in the District Court could not be sustained without personal service, and thereupon discharged the attachments, quashed the summons and struck the petition and amended and supplemental petition from the files (R. 47).

On appeal, the Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on the specific ground that the attachments and garnishments in the state court, prior to removal, were premature and void because they were secured prior to the first publication of notice, and that an attachment could not be secured under an affidavit filed after removal without personal service (R. 94).

II. OPINIONS BELOW

The opinion of the District Court is found at page 47, *et seq.* of the record, and the opinion of the Circuit Court at page 94, *et seq.* The latter opinion is reported in 100 F. 2d 844.

III. JURISDICTION

The date of the judgment to be reviewed is January 11, 1939 (R. 93), and is reviewable under Section 240(a) of the Judicial Code (U. S. Code, Title 28, Sec. 347), as amended by the Act of Congress approved February 13, 1925, C. 229, Sec. 1, 43 Stat. 938.

IV. ISSUES

There are three main issues on this appeal:

1. Under Ohio law, is an attachment premature and void which is secured after the filing of a petition and issuance of summons, but prior to the first publication of notice?
2. Where the defendant in a pending action appears specially, and voluntarily removes the case from a state court in Ohio to a Federal District Court, may the plaintiff secure an attachment after removal in conformity to Ohio law?
3. Was Dennis W. Drennan incompetent to act as notary public on the affidavits in attachment filed in the state court?

On the foregoing issues, the petitioner will support the following propositions:

1. Under Ohio law, an attachment secured after the filing of a petition and the issuance of summons, but prior to the first publication of notice is not premature and void.

2. An attachment may be secured in conformity to Ohio law after the action has been removed to the federal court by the defendant.

3. Dennis W. Drennan was competent to act as the notary public on the affidavits filed in the state court.

V. ARGUMENT

1. UNDER OHIO LAW AN ATTACHMENT SECURED AFTER A PETITION IS FILED AND SUMMONS ISSUED, BUT PRIOR TO THE FIRST PUBLICATION OF NOTICE, IS NOT PREMATURE AND VOID

In Ohio an Action Is Commenced by Filing a Petition and Causing Summons to Issue. An Attachment Can Be Secured at or After the Commencement of the Action. No Time Is Set by Statute Within Which Publication Must Be Begun.

The court below squarely held that in Ohio an attachment secured after the filing of a petition and the issuance of summons, but prior to the first publication of notice was premature and void.

In the report of the decision of the court below in 100 F. 2d 844, the second paragraph of the syllabus is as follows:

> "In Ohio, an attachment issuing before personal service is obtained, or before the beginning of the publication for substituted service, is premature and void. Gen. Code Ohio, Sec. 11292."

This holding is directly in conflict with the following decisions of the Supreme Court of Ohio and other courts in that state.

Bacher vs. Shawhan, 41 O. S. 271;
Seibert vs. Switzer, 35 O. S. 661;
Lessee of Paine vs. Mooreland, 15 Oh. 435;
St. John vs. Parsons, 54 Oh. App. 420, 8 Oh. Op. 169, 23 Ohio Abs. 432;
Citizens National Bank vs. Union Central Insurance Co. 12 Oh. C. C. (N.S.) 401;
Royal Indemnity Co. vs. Agrios, 7 Oh. Op. 272, 22 Oh. Abs. 312;
Central Savings Bank vs. Langenbach et al., 1 Oh. N. P. 124.
See 4 Oh. Jur. 68, Sec. 44.

In *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, the facts are stated in the syllabus which follows:

"1. In an action where property is attached and summons returned 'not served,' no time is fixed by statute within which service by publication must be made.

"2. Hence: Where the service by publication was not completed until eight months after the return of summons, it is error to dismiss the action for an alleged want of jurisdiction by reason of such delay."

And in *Seibert vs. Switzer*, 35 O. S. 661, *supra*, there is the following syllabus:

"1. An attachment under the civil code, is an auxiliary proceeding in an action, which may be sued out by the plaintiff, at or after the commencement of such action, by filing a petition and causing a summons to issue thereon.

"2. About 11 o'clock A.M., an order of attachment was issued upon the filing of an affidavit and giving bond. It was served and returned about 3 o'clock P.M., but no petition was filed until about

6 o'clock P.M. of the same day. *Held,* that the attachment was issued without authority of law, and as against other attaching creditors and lien holders gave no priority."

At page 665, the court said:

"An action is commenced or brought, within the meaning of Sections 192 and 193, by the filing of a petition and causing a summons to issue thereon, Code, Sec. 55. Until then there is no action in which an attachment can issue."

In *St. John vs. Parsons,* 54 Oh. App. 420, *supra,* a petition was filed and summons issued which was later returned "Not found." An affidavit was filed with the petition and an attachment levied on real estate before service by publication was begun. The language quoted below appears at page 422 of the report:

"The order of attachment will not be set aside because issued before the service by publication was begun."

There is the following paragraph in the syllabus in *Citizens Bank vs. Union Central Life Insurance Co.,* 12 Oh. C. C. (N.S.) 401, *supra*:

"3. An action has been begun under the attachment law when the petition has been filed and summons issued thereon, and the order of attachment will not be set aside because issued before the service by publication was begun."

The syllabus in *Royal Indemnity Co. vs. Agrios,* 7 Oh. Op. 272, *supra,* follows:

"1. An attachment may issue immediately upon the filing of the petition or any time thereafter, if grounds therefor exist so long as the petition is *bona fide* and the steps required to complete the commencement of the action are followed with due diligence."

And in *The Central Savings Bank vs. Langenbach*, 1 Oh. N. P. 124, *supra*, there is the following syllabus:

> "1. In an action where property is attached, and summons returned 'not served,' and the defendant is brought in by publication, made eight months after the return of summons, the lien of the attachment thus created will be superior to the liens of attachments issued and levied on the same property after the commencement of such action, and before said publication was made.
>
> "2. An action is not commenced alone by filing a petition and an affidavit for publication, and making publication, but *a summons must be issued* whether service can be had only by publication or not.
>
> "3. Property seized under an order of attachment issued in a case where no summons was issued, creates no valid lien on the property as against other lien holders."

The Ohio rule is stated in *Vol.* 4, *Oh. Jur.* 68, *Sec.* 44, as follows:

> "An attachment issued after the filing of the petition and after the issuance of the summons, is issued at or after the commencement of the action within the meaning of the statute. An attachment issued with the summons after the petition is filed, is issued at the commencement of the action."

The procedural details for securing an attachment in Ohio have been well settled, since the decision by the Supreme Court of Ohio in *Lessee of Paine vs. Mooreland*, (1846) 15 Oh. 435, *supra*, where it was expressly held under the same or similar statutes that a court acquired jurisdiction in attachment by the issuing of process, predicated upon a petition, and the attaching of property under a requisite affidavit.

Ohio General Code, Sec. 11279, provides:

> "A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon."

(Considered and discussed in Bagell vs Belcher 31 O.S. 571 and Burton vs Ins. Co. 26 O.S. 41)

Ohio General Code, Sec. 11819, provides, so far as material:

> "In a civil action for the recovery of money, *at or after its commencement*, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:" (Grounds omitted.)

The court below relies upon its decision in *Doherty vs. Cremering et al.*, 83 F. (2d) 388, and upon *Seibert vs. Switzer*, 35 O. S. 661, *supra*.

In the *Seibert* case no petition had been filed nor any summons issued when the attachment was secured, and in *Henrietta Mining & Milling Co. vs. Gardner*, 173 U. S. 123, also relied upon, the judgment below was attacked on the ground that "the attachment was void because the writ was issued before the issuance of summons."

With all due respect, it is submitted that the holding and the language in *Doherty vs. Cremering* is utterly incomprehensible. The court states that a petition was filed in the Common Pleas Court against a non-resident defendant, and that service was attempted "by leaving a copy of the petition at his usual place of business in Cincinnati" which service the court properly held was invalid.

It appears, however, that following removal the federal court "quashed the service of summons." Nothing is said as to whether or not summons was issued and

if so, when. Upon these partial and confusing facts the court then purports to follow the rule announced in *Seibert vs. Switzer*, 35 O. S. 661, *supra*, on the theory that it was not overruled by *Bacher vs. Shawhan*, 41 O. S. 271, *supra*. Obviously, the *Shawhan* case does not overrule the *Seibert* case because the facts are entirely different and the legal principles announced are entirely consistent. But it is an inexplicable mystery how the Circuit Court could find support in the *Seibert* case for its decision in the *Doherty vs. Cremering* case, or in its decision in this case. The case of *Seibert vs. Switzer* holds that an attachment may be secured at any time after the filing of a petition and issuance of summons.

In spite of the fact that summons was issued at the time he petition was filed in the case at bar, bringing it within the provisions of Ohio General Code Sections 11279 and 11819, quoted *supra*, the Circuit Court below has held that Ohio General Code Section 11230 is controlling. This section is quoted below:

> "An action shall be deemed to be commenced *within the meaning of this chapter*, as to each defendant, at the date of the summons which is served on him or on a co-defendant who is a joint contractor, or otherwise united in interest with him. When service by publication is proper, the action shall be deemed to be commenced at the date of the first publication, if it be regularly made." (Italics ours.)

Ohio General Code Section 11231 follows:

> "*Within the meaning of this chapter*, an attempt to commence an action shall be deemed to be equivalent to its commencement, when the party diligently endeavors to procure a service, if such attempt be followed by service within sixty days." (Italics ours.)

Construing Ohio General Code Section 11231, the Supreme Court of Ohio in *Bacher vs. Shawhan*, 41 O. S. 271, *supra*, uses the following language at page 272:

> "It will be observed that the restrictive words 'within the meaning of this chapter' confine the operation of this section to matters concerning the limitation of actions."

See 1 Ohio Juris. 336 Sec. 25 for complete discussion of the commencement of actions in Ohio.

Both sections of the Code quoted above are in the chapter on "Limitations of Actions," and the same reasoning applies equally to Section 11230.

It should be noted that Judge Allen in the footnote to her opinion in *Doherty vs. Cremering, supra*, only quotes the last sentence of Ohio General Code, Section 11230, omitting the sentence containing the restrictive words "within the meaning of this chapter."

In *Royal Indemnity Company vs. Agrios*, 7 Oh. Op. 272, the court clearly analyzes the Ohio statutes, and holds that Ohio General Code Section 11230 has no application where a petition had been filed and summons issued.

In *Bear vs. Old Tyme Distilleries*, 5 Oh. Op. 530, relied on by the respondent in the lower courts, the court expressly says "no summons was issued in this case." It is, therefore, not in point and is referred to here because it was the only case in Ohio cited by opposing counsel in the Circuit Court below.

On principle, the decision of the Circuit Court is obviously wrong. The statutes of Ohio providing for attachments involving non-resident defendants were the same in all material respects in 1853 as they are today.

See: Swan & Critchfield; Revised Statutes of Ohio (in force August 1, 1860), Vol 2, page 1002;
4 Oh. Jur. 16, Sec. 3.

Clearly the legislature never intended to require publication before an attachment. In 1853 such a requirement would have prevented a successful attachment, because there were few, if any, daily newspapers. Even under present conditions the necessity of securing an attachment and publication on the same day would be extremely difficult, if not impossible, and the absurdity of such a requirement should be self-evident.

However, under the rule announced by the court below, the publication must precede the attachment. If this were true, there usually wouldn't be any property thereafter to attach because the defendant would remove the property from the court's jurisdiction. In 1853 it might have been necessary to wait a week or more before any publication could be made.

On theory, the very purpose of publication is to notify the defendant that his property has been attached in a pending action, and that the court has acquired jurisdiction, not over the person of the defendant, but over his property, and that unless an answer is filed by a certain time a judgment will be entered which can and will be satisfied out of the property attached. A judgment in excess of the value of the property attached would be without effect as to such excess. 6 C. J. 90, Sec. 125. It is only the combination of an attachment and a pending action that gives a court jurisdiction to enter a judgment.

In this type of case the action is *quasi in rem.* In *Freeman vs. Alderson,* 119 U. S. 185, this court says at page 187:

> "There is, however, a large class of cases which are not strictly actions *in rem,* but are frequently spoken of as actions *quasi in rem,* because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted."

It is obvious that the courts below utterly misconstrued the nature of this action and the purpose of publication under the Ohio Statutes. See also: *Pennington vs. Fourth Bank,* 243 U. S. 269, 61 L. Ed. 713, 37 S. C. 282. It is also obvious that the courts below failed to follow the decisions of the Ohio Supreme Court expressly holding that an attachment may be secured "at or after" the commencement of an action, that an action is commenced by "filing a petition" and "causing summons to be issued thereon," and that no time is set by statute within which publication must be commenced.

(a) DECISIONS OF THE OHIO SUPREME COURT ARE CONTROLLING

In spite of the well established rule in Ohio that an attachment may be secured after the filing of a petition and the issuance of summons, although prior to the first publication of notice, the court below held that such an attachment is premature and void.

28 U. S. C. A., Sec. 724 (R. S. Sec. 914), provides:

> "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform as near as may be, to the practice, pleadings,

and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding."

The rule is now well settled that except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the state as declared by its legislature in a statute or by its highest court.

Erie Railroad vs. Tompkins, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. 817.

Applying the foregoing rule, it has been repeatedly held in actions involving attachments authorized by the statutes of a state, that the federal courts apply and enforce such remedies, adopting and following the interpretation of the statutes by the highest court of the state.

Loewe vs. Savings Bank, 236 Fed. 444, aff'd 242 U. S. 357;

Perez vs. Fernandez, 202 U. S. 80, 50 L. Ed. 942, 26 Sup. Ct. 561;

Fleitas vs. Cockren, 101 U. S. 301, 25 L. Ed. 954;

Beach vs. Viles, 27 U. S. 675, 2 Peters 675;

LaVarre vs. International Paper Co., (D. C., S. C.) 37 F. (2d) 141;

Wheeling Traction vs. Pennsylvania Co., (D. C., Ohio) 1 F. (2d) 478;

Pere Marquette Railway vs. Western Dispatch, (D. C., Mich.), 284 F. 574.

It follows that the courts below are bound by the decisions of the Ohio Supreme Court in *Bacher vs.*

Shawhan, 41 O. S. 271, *supra*, and *Seibert vs. Switzer*, 35 O. S. 661, *supra*, and should have followed the rule laid down in those cases that an attachment after the filing of a petition and the issuance of summons is not premature, although before publication of notice.

(b) THE DECISION BELOW CONFLICTS WITH PREVIOUS DECISION OF THIS COURT

This court has held that where an action has been commenced in the state court and property attached, the plaintiff, after removal, may complete service by publication, or if not commenced, the plaintiff can commence publication.

> Clark vs. Wells, 203 U. S. 164, 172, 51 L. Ed. 138, 27 Sup. Ct. 43.

In so ruling, this court necessarily held that an attachment secured after the commencement of the action, but prior to publication, was not premature and void and it has been likewise so held in the case of *Friedman Brothers Co. vs. Greaney*, (D. C., N. Y.) 297 Fed. 478.

The syllabus in *Friedman Brothers Co. vs. Greaney, supra*, follows:

> "Under Rev. St. No. 914 (Comp. St. No. 1537), and Judicial Code, No. 36 (Comp. St. Nos. 1018, 1020), making the state practice applicable to attachments commenced in the state court, on removal of cause to a federal court, it is permissible in an action commenced in a state court by attachment and removed to a federal court, whether necessary or not, to bring in a defendant by order of publication as against a contention that an order of publication would be void as the commencement of a suit by attachment."

See also:

Purdy vs. Wallace Moore & Co., (C. C., Mass.) 81 Fed. 513.

2. AN ATTACHMENT MAY BE SECURED IN CONFORMITY WITH OHIO LAW AFTER THE DEFENDANT HAS REMOVED THE ACTION TO THE FEDERAL COURT

If the Case Had Remained in the State Court Other Affidavits Could Have Been Filed and Orders of Attachment Issued Pursuant Thereto Prior to Judgment, Attaching Other Property of the Defendant. 28 U. S. C. A., Section 726 (R. S., Section 915) Preserves This Right After Removal.

As previously shown, the Circuit Court erred in holding that the attachments secured in the state court prior to removal were premature and void because secured prior to the first publication of notice.

Having erroneously so held, however, said court proceeded to err further in holding that the attachment secured under the affidavit filed in the District Court after removal was invalid because the defendant could not be personally served.

Both courts below principally relied upon the decision of this court in *Big Vein Coal Co. vs. Read*, 229 U. S. 31, 33 S. Ct. 694, 57 L. Ed. 1053.

That case, however, was commenced in a federal court, whereas the case at bar was begun in a state court and thereafter removed by the defendant to the federal court. For this reason entirely different considerations and principles are involved, and the rule laid down in the *Coal Company* case is not applicable.

In the *Coal Company* case the plaintiff selected his own forum. On the other hand, in the case at bar the plaintiff commenced his action in a state court under the Ohio statutes, and it was the defendant who thereafter appeared specially and voluntarily removed the case to the federal court.

In short, can a defendant in an action commenced in a state court deprive the plaintiff therein of the attachment remedies provided by the Ohio statutes by the simple procedure of removing the case to the federal court?

An examination of Ohio procedure and relevant federal statutes clearly shows that the plaintiff cannot be deprived of such remedies, and reveals the incongruity of the position of the lower courts.

Under the well established practice in Ohio more than one attachment may be secured in the same action. Thus property may be attached under one affidavit. Afterwards, another affidavit may be filed and other assets attached thereunder. It is not necessary to commence a new action prior to judgment merely to attach additional assets, as this would result in a multiplicity of actions with several suits pending on the same claim, based on the same evidence, but requiring separate trials. Ohio General Code, Section 11820, merely provides that an order of attachment shall be made when there is an affidavit filed setting up certain requisite grounds.

Even where an attachment is ineffective and void because of a fatally defective affidavit, a new affidavit under Ohio law could be filed and an attachment secured under such affidavit, or the defective affidavit could be amended and a new attachment filed under the original

affidavits, properly amended. It is not necessary to commence a new action.

Leavitt vs. Rosenberg, 83 O. S. 230, 235;
Pope et al. vs. Hibernia Insurance Co., 24 O. S. 481.

In *Leavitt vs. Rosenberg*, 83 O. S. 230, *supra*, the Supreme Court says at page 235:

> "The plaintiff did not ask the privilege of filing a new perfect affidavit with a view of issuing a new writ of attachment. *That he had an undoubted right to do* and the court did not refuse him such privilege. Indeed, he could have filed such an affidavit without applying to the court for leave." (Italics ours.)

And in *Pope vs. Hibernia Insurance Company*, 24 O. S. 481, *supra*, there is the following paragraph of the syllabus:

> "Jurisdiction cannot be acquired in such case, by amendment of the petition and affidavit, showing a cause of action arising upon contract, *without the issuance of an attachment after the amendment.*" (Italics ours.)

The state procedure, however, must be considered in connection with federal statutes and precedent.

It is a settled law that in a proper case the defendant may remove a case begun in a state court to a federal court, and that by virtue of the removal, the federal court becomes possessed of the action with all the rights and powers respecting the cause of action and the parties thereto as the state court would have possessed.

Goldey vs. Morning News, 156 U. S. 518, 15 S. Ct. 559, 39 L. Ed. 517;
Clark vs. Wells, 203 U. S. 164, 27 S. Ct. 43, 51 L. Ed. 138, *supra*.

The rule is also settled that a case is removed to the Federal District Court upon the filing of a sufficient petition and bond therefor in the state court.

Remington vs. Central Railway, 198 U. S. 95, 25 S. Ct. 577, 49 L. Ed. 959;
Webb vs. Southern Railway, 248 Fed. 618, cert. denied 247 U. S. 578.

Under the foregoing rules the defendant may remove the action whether the plaintiff likes it or not, and the action is removed merely upon the filing of a sufficient petition and bond therefor in the state court. Thus, the defendant could prevent a subsequent attachment of his property in the action by filing a petition and bond for removal, although it could have been secured had the action remained in the state court. The right to file a new suit would offer no solution since the same procedure could be repeated. Under the rules laid down in the Circuit Court below the defendant could prevent the plaintiff from ever securing an attachment in any action, because a plaintiff would have to file suit, publish, and then attach.

When Congress enacted the following statutes it obviously never intended that any such incongruous situation should exist.

28 U. S. C. A., Sec. 724 (R. S., Sec. 914):

> "The practice, pleadings, and forms and modes of proceeding in cival causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, any rule of court to the contrary notwithstanding."

28 U. S. C. A., Sec. 726 (R. S., Sec. 915):

> "In common law causes in the district courts the plaintiff shall be entitled to similar remedies, by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such district courts may, from time to time, by general rules, adopt such state laws as may be in force in the states where they are held in relation to attachments and other process. Similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."

At all times referred to in this action the following rule of the United States District Court for the Northern District of Ohio was in full force and effect:

> "Rule 5(2): As authorized by Section 915 of the Revised Statutes (U. S. Code, Title 28, Sec. 726), the court adopts in law cases all laws of the State of Ohio now in force in relation to attachments, and other process, subject to the proviso contained in said section."

28 U. S. C. A., Sec. 79 (R. S., Sec. 646):

> "When any suit shall be removed from a state court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. * * *"

The Circuit Court below reasoned that since neither this Honorable Court, nor any other Circuit Court of Ap-

peals, had construed the foregoing statutes to permit it, an attachment could not be secured after removal.

Both courts below cite *Cleveland & Western Coal Co. vs. J. H. Hillman & Sons,* (D. C., Ohio) 245 Fed. 200. In that case an action was commenced in the state court and an attachment secured. After removal, the attachment was discharged because the affidavit filed in the state court was defective. Thereafter a totally new affidavit was filed and an attachment secured which was then discharged on the theory that it amounted to the commencement of an action in the federal court without personal service of summons.

The *Hillman* case must be distinguished from the case at bar (1) because the attachments prior to removal in the case at bar are entirely regular and valid, whereas in the *Hillman* case the attachment was conceded to be a nullity; (2) the original attachment had been quashed *before* the second one had been secured in the *Hillman* case, whereas the attachment in the federal court in the case at bar was secured before any disposition had been made of the original attachment; and (3) the proceedings in the *Hillman* case following removal were not and did not purport to amend any proceedings taken in the state court. The effect of such an amendment is hereinafter discussed at page 39 *et seq.*

However, the decision in the *Hillman* case is incorrect. Judge Westenhaver, the district judge who decided the case, fell into error when he concluded that no action was pending after the discharge of the attachment secured in the state court. He says at page 203:

> "Under the Ohio law, an action is pending, so as to stop the running of the statute of limitation, from the time process is issued, only when actual

service is made within sixty days thereafter. G. C. Secs. 11230, 11231. An attachment can be issued only at or after the commencement of an action, G. C. Secs. 11279, 11280. All of the steps indicated by these sections as necessary to give a plaintiff the status of one having an action pending in court would of necessity have to be taken after the order discharging the attachment, if, as in the present case, the attachment were discharged for want of a sufficient affidavit."

Although Judge Westenhaver purported to apply the Ohio law, his conclusion is directly in conflict with the decisions of the Ohio Supreme Court in *Leavitt vs. Rosenberg,* 83 O. S. 320, *supra,* and *Pope et al. vs. Hibernia Insurance Co.,* 24 O. S. 481, *supra.* In the former case the court says at page 235:

"The plaintiff did not ask the privilege of filing a new perfect affidavit, with a view of issuing a new writ of attachment. *That he had an undoubted right to do.* * * * Indeed, he could have filed such an affidavit without applying to the court for leave."

And in *Pope et al. vs. Hibernia Insurance Company,* 24 O. S. 481, *supra,* there is the following paragraph of the syllabus:

"Jurisdiction cannot be acquired in such case, by amendment of the petition and affidavit, showing a cause of action arising upon contract, *without the issuance of an attachment after the amendment.*"

Thus, in both of the foregoing cases the court held that after the discharge of an attachment because of a defective affidavit the plaintiff could have filed a new and perfect affidavit and proceeded to secure an attach-

ment in the same action, and hence, that the discharge of the attachment did not automatically carry with it the dismissal of the entire action. These cases are both entirely sound on principle and are consistent with the theory of an action *quasi in rem* and the attachment statutes of the State of Ohio.

We have previously shown (*supra*, p. 10 *et seq.*) that G. C. Sections 11230, 11231, referred to in the *Hillman* case, have no application where a petition has been filed and summons issued and are confined in operation to the chapter of the Code relating to limitation of actions. The reference to these sections, however, was undoubtedly the basis for their erroneous application in *Doherty vs. Cremering supra*, and in the case at bar.

There is no decision, so far as we have found, in Ohio, which is contrary to the well established rule as announced in *Leavitt vs. Rosenberg, supra*, and *Pope et al. vs. Hibernia Insurance Co., supra*. Because it was urged in the lower courts, however, we wish again to call the court's attention to the fact that in *Bear vs. Old Tyme Distilleries, Inc.*, 5 Oh. Op. 530, the Common Pleas Court expressly said: "no summons was issued in this case," and that the subsequent report in 6 Oh. Op. 253 is, therefore, misleading in so far as it indicates that the discharge of an attachment carries with it the dismissal of the entire suit.

It follows that even if the attachments secured in the state court prior to removal were void, which they are not, the attachment secured in the federal court following removal should nevertheless be sustained. The plaintiff had an action pending upon which to perfect the jurisdiction of the federal court by the attaching of prop-

erty of the defendant. As said before, it is a combination of a pending action and the attachment of assets pursuant thereto that creates jurisdiction. If plaintiff had a pending action the subsequent steps taken may follow to perfect the court's jurisdiction.

If the attachments in the state court are valid, as contended, the only question is whether or not the jurisdiction of the court can be extended over the additional assets attached. It is submitted that there is no logical reason why it should not be, and that a holding to the contrary would merely result in a multiplicity of actions and serve no useful purpose either from a practical or theoretical point of view.

3. DISTRICT COURT ERRED IN HOLDING NOTARY PUBLIC ON AFFIDAVITS FILED IN STATE COURT DISQUALIFIED

Notary Had No "Legal, Material, Pecuniary and Immediate" Interest in This Litigation

The District Court held that the notary public on the affidavits filed in the state court was disqualified because he had been an employe of a partnership of which the plaintiff (petitioner) was a member and subsequently of a corporation of which the petitioner was the president.

In so holding the trial court clearly erred. The claim was an individual and not a partnership or corporation claim and the notary had no other connection with the case whatsoever (R. 61).

The applicable statutes of Ohio in effect when the affidavits in question were acknowledged, are quoted below:

General Code Sec. 11523:

> "An affidavit may be used to verify a pleading, to prove the service of summons, notice or other process in an action, or to obtain a provisional remedy, an examination of a witness, a stay of proceedings, or upon a motion, and in any other case permitted by law."

General Code Sec. 11524:

> "An affidavit may be made in or out of this state before any person authorized to take depositions, and unless it is a verification of a pleading, must be authenticated in the same way as a deposition."

General Code Sec. 11532:

> "The officers before whom depositions are taken must not be a relative or attorney of either party or otherwise interested in the event of the action or proceeding."

The Circuit Court did not find it necessary to pass upon the point but stated that there was "persuasion" in the argument that said notary was *not* disqualified, (1) because he was not an attorney in the case, and (2) because to be "otherwise interested" in the case under the Ohio statute (G. C. Sec. 11532) the interest must be some "legal, material and immediate interest" in the controversy. The Circuit Court indicated the proper rule and the trial court clearly was in error.

Bevan vs. Krieger, 289 U. S. 459, 77 L. Ed. 1316, 53 Sup. Ct. 661;

Tumey vs. Ohio, 273 U. S. 510, 523, 71 L. Ed. 749, 47 Sup. Ct. 437;

Rhinelander vs. Pittsburgh Co., 15 Oh. C. C. (N.S.) 286.

In *Rhinelander Company vs. Pittsburgh Company*, 15 Oh. C. C. (N.S.) 286, *supra*, the court says:

> "The notarial officer before whom this affidavit was sworn to was not a relative or attorney of either party, nor does the record show that he was 'otherwise interested in the event of the action or proceeding.' He was a young man working on a salary for a firm of attorneys in the case. The interest in the event of the action or proceeding which disqualified a notary public from acting in the taking of affidavits, we hold to be some legal, certain and immediate interest such as formerly disqualified a witness from testifying. See *Smith vs. The State*, 18 Ohio 89."

The testimony of the notary is brief (R. 61-64). He testified that he is an attorney at law and a notary public. He neither prepared any paper filed in this action nor was consulted at any time in regard thereto. He is not an attorney of record in the case, nor associated with any attorney of record. He had no independent recollection of having acted as notary on the affidavits in question, but identified his signature. The plaintiff (petitioner) had never employed him as personal counsel and he had no interest in the case in any way, shape or form, financially or otherwise, either before its inception or since. He is not related to the plaintiff. His only connection with the plaintiff was his association with a municipal bond house of which the plaintiff was a partner. He had continued in the employ of this partnership until its dissolution and thereafter was employed by a corporation of which the plaintiff (petitioner) was president.

It was argued in the courts below that the notary public was disqualified under the provisions of General Code Section 121. This section provides in substance

that no banker, broker or clerk of a bank, banker or broker shall be competent to act as a notary public in any matter in which such bank, banker or broker is interested. (Appendix A.)

The argument based upon this statute is novel and astute. Plaintiff's petition filed in the state court sets forth a cause of action for personal services rendered the defendant under a written contract. It has no connection whatsoever with the purchase or sale of securities or anything else by the plaintiff for his own account or that of anyone else, and has absolutely no connection with any bank or brokerage firm.

The Attorney General of Ohio was of the opinion that the word "broker" used in General Code Section 121 related only to a broker doing a banking business. 1928 O. A. G. No. 2044. Likewise, the section could apply only to a banker while acting for some bank, and petitioner was not an individual money lender, if the term "banker" is to be used so loosely. Plaintiff's action, on the other hand, is an entirely personal matter which was not done for or on behalf of any bank and was in no way connected with the banking business, and this section of the Ohio Code obviously has no application.

The uniform rule in the United States is that an attachment affidavit, improperly acknowledged, is not a nullity and may be amended by swearing to it before another notary. It is not necessary thereafter to secure any further service of the order of attachment.

Ramsey Motor Co. vs. Wilson, (Wyo.) 30 P. (2d) 482, 91 A. L. R. 908;

Sweringen vs. Howser, 37 Kan. 126, 14 P. 436;

Frenzer vs. Phillips, 67 Neb. 229, 77 N. W. 668;

Heidelberger vs. Heidelberger, 196 App. Div. 626, 187 N. Y. S. 864.

In *Ramsey Motor Co. vs. Wilson*, 91 A. L. R. 908, *supra*, there is the following paragraph of the syllabus:

> "An attachment affidavit sworn to before a notary who, being attorney for plaintiff, was incompetent to administer the oath to the affiant, is not a nullity, but merely voidable, and hence may, with the leave of the court, be amended by swearing to it before another notary."

28 *U. S. C. A., Sec.* 777 (R. S. 954), provides, so far as material:

> "No summons * * * or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form, * * * and such court shall amend every such defect and want of form. * * *"

Thus, even if the affidavit was improperly notarized, which it was not, the affidavit filed in the federal court had the effect of an amendment and rendered the attachment under the original affidavit valid *ab initio*.

4. THE AFFIDAVITS FILED IN THE STATE COURT AND PROCEEDINGS THEREUNDER WERE ENTIRELY LEGAL AND PROPER

(a) Attachment Statutes in Ohio Are to Be Liberally Construed

Because of the highly technical character of the criticisms of the proceedings in the state court hereinafter discussed, it should be clearly noted that in Ohio

the attachment statutes and all proceedings thereunder are remedial in nature and to be liberally construed in order to achieve justice between the parties.

General Code, Sec. 10214;

Hart vs. Andrews, 103 O. S. 218, 132 N. E. 846;

Weirick et al. vs. Mansfield Lumber Co., 96 O. S. 386, 117 N. E. 362;

Bridge vs. Ring, 25 Oh. App. 149, 157 N. E. 496.

In *Weirick vs. The Mansfield Lumber Company*, 96 O. S. 386, *supra*, the syllabus follows:

"1. Remedial statutes require a liberal construction and a liberal application to the facts of any given case.

"2. Statutes pertaining to attachment and the *procedure* incident thereto are of a remedial nature.

"3. To reinforce this general rule the general assembly of Ohio has specially enacted Section 10214, General Code, providing that 'The provisions of part third and all proceedings under it, shall be liberally construed, in order to promote its object, and assist the parties in obtaining justice.' Thereafter the general assembly made all the statutes pertaining to *attachment* a part of such 'part third'."

In *Hart vs. Andrews*, 103 O. S. 218, *supra*, there is the following paragraph in the syllabus:

"Attachment proceedings being remedial in their nature, should be liberally construed, and Section 10214, General Code, expressly provides that they shall be liberally construed in order to do justice between the parties. (*Weirick vs. Mansfield Lumber Co.*, 96 Ohio St. 386, approved and followed.)"

In *Bridge vs. Ring*, 25 Oh. App. 149, *supra*, the first paragraph of the syllabus is quoted below:

> "Under Section 10214, General Code, all proceedings relating to attachment must be liberally construed to promote objects of law and assist parties in obtaining justice."

(b) AFFIDAVITS FILED IN THE STATE COURT WERE NOT DEFECTIVE BECAUSE THE WORDS "DOES BELIEVE" WERE OMITTED

An Affidavit in Attachment Need Not Recite the Identical Language of the Statute. Words of Substantially the Same Meaning Are Sufficient, Since Such Statutes in Ohio Must Be Liberally Construed.

It was urged below that the affidavits filed in the state court were defective in failing to state that the affiant "does believe" and that this allegation is required under Ohio General Code, Section 11828 (Appendix B), which provides in substance that when an affidavit is filed stating that affiant has good reason to believe, and does believe, that any person, etc., has property of the defendant in his possession, an order of attachment, etc., shall be left with such person. The affidavits filed in the state court stated that the affiant had good reason to believe but omitted the allegation, in conformity with the generally accepted practice in Ohio that affiant "did believe."

The Supreme Court of the State of Missouri was required to pass upon precisely the same question and found that the allegation that the affiant "has good reason to believe" was the equivalent of alleging that "he does believe."

Massey vs. Scott, 49 Mo. Rep. 278.

The first paragraph of the syllabus in *Massey vs. Scott, supra,* follows:

> "That an affidavit in an attachment suit that deponent 'has good reason to believe that defendant has absconded,' etc., without alleging that 'he does believe,' etc., is sufficient."

It seems almost too obvious to argue that if one has knowledge of facts which negative his belief in a matter, he cannot have "good reason to believe" that it is true. This is simple, elementary logic. Hence the affidavit in the state court sufficiently complied with the statute.

We have previously pointed out that the attachment statutes and the proceedings thereunder are remedial in character and must be liberally construed to secure substantial justice between the parties. The allegations of the affidavit conformed to the well established practice in Ohio. See Baldwin's Ohio Civil Practice Manual, (1936 Revision) Form 312.

(c) CLAIMS THAT AFFIDAVIT FAILED TO DESCRIBE ANY PROPERTY AND DESCRIBED ONLY "JOINT" PROPERTY ARE INCONSISTENT AND OTHERWISE WITHOUT MERIT

It Is Not Necessary to State the Amount of the Debt Sought to Be Attached, Nor to State Whether the Debt Is Owing to One or Both of Joint Defendants.

It has been claimed that the affidavits filed in the state court were defective and failed to describe the property sought to be attached. The affidavits in question recited that the named garnishees

"* * * have moneys, property and assets of defendants Devon Syndicate, Ltd., and Paris E. Singer in their possession. * * *" (R. pp. 6, 12.)

It is apparently claimed that the plaintiff failed to state how much money the named garnishees had in their possession. With equal force it might be argued that no money was attached if the plaintiff had recited that the named garnishee held $100.00 whereas the amount actually was $101.00. In short, where the property sought to be attached is money in the hands of a garnishee, it is not necessary to state the amount.

In any event the requirement that the property be described is not for the benefit of the defendant, but for the benefit of the garnishee. It has been uniformly held that the garnishee may waive any of his own rights by appearing and answering.

Jenike vs. Preston, 36 Oh. App. 368, 173 N. E. 258;
Keppel vs. Moore, 66 Mich. 292, 33 N. W. 499;
Altona vs. Dabney, 37 Ore. 334, 62 P. 521;
Woodstown Bank vs. Trainer, 209 Pa. 398, 58 A. 816;
Goll vs. Hubbell, 61 Wis. 293, 21 N. W. 288.

It is also claimed that the affidavits referred solely to property owned jointly by the defendants, Paris E. Singer and Devon Syndicate, Ltd.

By the use of the conjunction "and" in the affidavits from which the quotation above is taken, not only the joint property of both defendants is included, but also the individual and separate property of either of them.

Aultman, Miller & Co. vs. Markley, (Minn.) 63 N. W. 1078;
Bayer vs. Lovelace, 204 Mass. 327, 90 N. E. 538;
6 C. J. 129, Sec. 196.

The second paragraph of the syllabus in the case of *Aultman et al. vs. Markley*, 63 N. W. 1078, *supra*, is as follows:

> "In an action against two defendants, an affidavit of garnishment which states that the garnishee 'is indebted to the said defendants in an amount exceeding the sum of $50.00' is sufficient to charge the garnishee for a debt due from him to one of the defendants alone."

The analysis of this situation by the court in the above action at page 1079 is illuminating:

> "2. The affidavit of garnishment states that the garnishee 'is indebted to the defendants in an amount exceeding the sum of Fifty Dollars ($50.00)' but does not otherwise state that the garnishee is indebted to the defendant W. D. Markley, or to him alone. It is contended that no debt can be garnisheed by this affidavit but a debt due to the defendants jointly; that by this affidavit the garnishee is charged as debtor of W. D. Markley alone. * * * We are of the opinion that in this respect the affidavit is sufficient. *When the affidavit contains all the terms of the statute, connected by conjunctives, not by disjunctives, we are of the opinion that, under the rules which should be applied to the summary proceeding of garnishment, it covers all property, effects and indebtedness in the hands of the garnishee which can, by garnishment proceedings, be appropriated to the payment of the plaintiff's judgment against the defendant.*" (Italics ours.)

The cases of *Winchester et al. vs. Pierson et al.*, 1 Oh. D. Rep. 169, and *Fiedler vs. Blow et al.*, 1 Oh. D. Rep. 245, are without significance because the opinions do *not* quote the phraseology of the affidavits, but merely the courts' conclusions as to the meaning of the language used.

The arguments based on the foregoing claims are without merit and cannot support the decision of the court below.

(d) THE SHERIFF'S RETURNS UPON THE ORDERS OF ATTACHMENT AND NOTICES TO GARNISHEES IN THE STATE COURT WERE REGULAR AND PROPER

It Is Not Necessary to Recite in the Return That a Copy of the Order Was Left With the Garnishee Named in the Affidavit, and the Returns on the Order of Attachment and Notice to Garnishee Are to Be Construed Together.

It was argued below that the sheriff's returns on the orders of attachment were defective because the names of the garnishees served and the time each was served were not stated, although these facts all appear on the returns on the "Notice to Garnishee."

It was also argued that the returns on the notices to garnishees are not authorized by statute, and that all returns were defective in that none of them recited that copies of the orders of attachment had been left with the named garnishees, *although this was in fact done* (R. 44).

Ohio General Code, Section 11836, provides in part:

> "The officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached. When garnishees are served, their names and the time each was served must be stated."

There is no requirement in the statute and it is not necessary for the sheriff to return on the order of attachment, or elsewhere, that a copy of the order was left with the garnishee named in the affidavit.

Weirick vs. Mansfield Lumber Co., 96 O. S. 386, 117 N. E. 362, *supra*.

The fourth paragraph of the syllabus in the *Weirick* case follows:

> "The return made upon the writ of attachment is governed by Section 11836, General Code, in which certain things 'must' be shown. The legislature having specified those things a court is not authorized to amend the statute by adding thereto. That is, as applied to this particular case, an amendment to the return showing that a copy of the order was left with the owner is not essential to the valdity of the return."

Opposing counsel relied upon the case of *Green vs. Coit*, 81 O. S. 280, below. Insofar as this case sustains the proposition for which it was cited, it has been expressly overruled by the later case of *Weirick vs. Lumber Company*, 96 O. S. 386, 117 N. E. 362, *supra*, wherein the Supreme Court of Ohio, in 96 O. S., says at page 399:

> "* * * * Insofar as the *Coit* case extends the requirements of the return beyond the plain mandatory provisions of the statute, the same is disapproved."

The remaining question is whether the sheriff properly returned the names of the garnishees and the time each was served.

The forms for orders of attachment and notices to garnishees issued by the clerks of courts in Ohio have, on the reverse side of each, an appropriate form to be filled in by the sheriff for his return. The practice from time immemorial has been for the sheriff to make two returns—one on the reverse side of each.

In the case at bar the sheriff returned on the back of the order of attachment that no property of the defendant could be found (R. 9), and on the notice to garnishee the names of the garnishees served and the time they were served, as required by the provisions of G. C. Section 11836 (R. 11, 14).

The law is clear that the two returns are to be considered and construed together.

Rosenhan vs. Cohen, 13 Oh. C. C. (N. S.) 102, 22 Oh. C. D. 637.

The second paragraph of the syllabus in the foregoing case follows:

> "Where there are debts owing to the defendant corporation in the county, service may be had on a secretary or agent if no other chief officer can be found in the county; and where the attachment and service of summons were issued together and returned in the same way by the constable, the two returns may be read and construed together as showing a lawful service of summons."

General Code Section 11836 does not require that the names of the garnishees served and the time each was served be returned on the order of attachment, and the

procedure followed in the case at bar is entirely regular and proper, containing all the necessary facts required by the statute in question to be returned. This is especially true in view of General Code Section 10214, providing that attachment statutes shall be liberally construed to achieve substantial justice between the parties.

In any event the returns of a sheriff can be amended at any time to show the correct facts, and are not fatal defects.

Fountain vs. Detroit, etc. Ry. (D. C., N. D., Ohio) 210 F. 982;

Paulin vs. Sparrow, 91 O. S. 279, 110 N. E. 258.

The second paragraph of the syllabus in *Fountain vs. Detroit, etc., Ry.*, 210 F. 982, *supra*, follows:

> "Where process has been properly served but the return of the officer is insufficient, the defect may be corrected by an affidavit of the officer showing the facts."

And in *Paulin vs. Sparrow*, 91 O. S. 279, *supra*, the third paragraph of the syllabus is quoted below:

> "3. A court has the authority to order the return of process amended in accordance with the facts relating to such service either before judgment or at any time after judgment that the evidence is available to establish the facts upon which the judgment of the court ordering the return amended is predicated."

Since the return on the notice to garnishees shows the name of each garnishee served, and the time each was served, no further affidavit should be necessary

under the holding of *Fountain vs. Railway*, 210 F. 982, *supra*.

In short, this highly technical argument that the sheriff's returns are defective is utterly without merit and its only purpose is to confuse the issues in this case.

(e) THE PROCEEDINGS IN THE STATE COURT WERE NOT ABANDONED BY THE PLAINTIFF

The Purpose of the Proceedings in the Federal Court Was to Preserve All Rights Previously Acquired and to Secure the Attachment of Further Assets.

It was urged below that by filing the amended and supplemental petition and affidavit in the federal court, the issuance of orders thereunder and subsequent publication, the plaintiff (petitioner) abandoned all of the previous proceedings in the state court as a matter of law.

Obviously, such a result was never intended. Whether or not there has been an abandonment of rights previously acquired is a conclusion of fact. The law will not impute such an intent.

The precise question was presented to the Supreme Court of Connecticut in *Lawrence vs. Security Co.*, 56 Conn. 423; 15 A. 406; 1 L. R. A. 342. At page 345 in the report in Volume 1 L. R. A., the court uses the following language:

> "This question of intent is one of fact, and there is no finding of abandonment; and inasmuch as the plaintiff might in effect acquire additional security by the attachment of additional property, the law will not impute to him an intentional abandonment of the first suit (garnishment)."

The principal case relied on below by opposing counsel in support of their contention of abandonment is *Smith vs. Wilson,* (La.) 128 So. 682. The case involves a construction of the Louisiana statutes where two orders of attachment were issued under the same affidavit. The facts of the two cases are so obviously different that further comment is unnecessary.

5. PROCEEDINGS IN STATE COURT MAY BE AMENDED AFTER REMOVAL

The Amendment of an Affidavit in Attachment in the Federal Court Makes the Attachment Under the Original Affidavit Valid From the Time Secured Because of 28 U. S. C. A., Sec. 777 (R. S., Sec. 954).

In addition to the rule that an attachment may be secured under an affidavit filed in a pending action following removal, there is also substantial authority that an affidavit in attachment may be amended so as to render the attachment thereunder valid *ab initio.*

We have previously shown (*supra,* page 17) that under the well established procedure in Ohio if an attachment is void because of a defective affidavit, the affidavit may be amended or a new one filed and an attachment subsequently secured under an order issued pursuant thereto.

Leavitt vs. Rosenberg, 83 O. S. 230;
Pope et al. vs. Hibernia Insurance Co., 24 O. S. 481.

It likewise is well settled that federal courts have full and complete control over pleadings and process with full authority to allow any amendments thereto.

This rule applies to amendments of affidavits in attachment and garnishment. Such an amendment has a retroactive effect and renders the attachment under the defective affidavit valid from the time of the service of the original order.

28 U. S. C. A., Sec. 777, (R. S. 954);
Universal Co. vs. Rederiaktiebolaget, (D. C., N. Y.) 263 F. 243;
Erstein vs. Rothschild, (C. C. Mich.) 22 Fed. 61;
Booth vs. Denike, (C. C., Tex.) 65 Fed. 43;
Nevada Co. vs. Farnsworth, (D. C., Utah) 89 Fed. 164;
Bowden vs. Burnham, (C. C. A. 8) 59 Fed. 752;
Salmon vs. Mills et al., (C. C. A. 8) 68 Fed. 180.

See also:

Phelps vs. Oaks, 117 U. S. 236;
Matthews vs. Dinsmore, 109 U. S. 216;
Stephenson vs. Kirtley, 269 U. S. 163.

Thus 28 U. S. C. A., Sec. 767 (R. S. Sec. 948) provides:

> "Any district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues."

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28 U. S. C. A., Sec. 777, provides as follows:

> "No summons, writ, declaration, return, process, judgment, or other proceedings in civil

causes, in any court in the United States, shall be abated, arrested, quashed, or reversed for any *defect or want of form;* but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such condition as it shall, in its discretion and by its rules, prescribe."

In *Booth vs. Denike*, 65 F. 43, *supra*, there is the following syllabus:

"2. Though, under the decisions of the Texas State Courts, an affidavit for garnishment is not amendable, Rev. St. Sec. 914, providing that the practice, pleadings, and forms and modes of proceeding in the circuit and district courts shall conform as near as may be to those existing in the courts of the state within which the circuit or district courts are held, does not require a federal court to follow such decisions, it being permitted to make the amendment by Sec. 948, authorizing it to allow an amendment of any process where the defect has not prejudiced and the amendment will not injure the party against whom the process issues, and by Sec. 954, authorizing it at any time to permit either party to amend any defect in the process or pleadings on such conditions as it shall, in its discretion, prescribe."

In *Nevada vs. Farnsworth*, 89 F. 164, *supra*, there is the following paragraph of the syllabus:

"Though a complaint on which a writ of attachment is issued fails to allege facts necessary to

> give the court jurisdiction, the defect is cured by an amendment, made on the hearing of a motion to discharge the attachment, showing that such facts existed when the complaint was originally filed and the writ issued."

And in *Erstein vs. Rothschild*, 22 F. 61, *supra*, the syllabus is as follows:

> "Where a writ of attachment has been issued in a suit instituted in the Circuit Court of the United States on a defective affidavit, the court may, when right and justice require it, allow such affidavit to be amended, although, under the statutes of the state in which the Circuit Court is held, the state court would have no power to allow such an amendment."

The primary consideration in any action *quasi in rem* is whether or not there has been an actual seizure of any property of the defendant pursuant to an order issued in a pending action. Since the federal court by reason of 28 U. S. C. A. Sec. 767 and Sec. 777, quoted above, has full and complete control over all pleadings and process with a power to allow any amendment thereto, it follows that even if the affidavits filed in the state court prior to removal had been defective, which they were not, the amended affidavit filed after removal which was admittedly proper in all respects amended the original affidavit so as to render the attachment thereunder valid from the date of service of the original order of attachment.

CONCLUSION

The attachments secured in the state court prior to removal were entirely regular and proper, and should be sustained. An attachment secured after the filing of a

petition and issuance of summons is not premature and void because secured prior to the first publication of notice.

If the case had remained in the state court a new affidavit could have been filed in the pending action and additional assets attached thereunder. If this can be done prior to removal it can be done afterwards. The defendant cannot deprive the plaintiff of the remedies provided by the attachment laws of Ohio by removing the case to the federal court.

The attachment statutes of Ohio and all proceedings thereunder are to be liberally construed to promote justice between the parties. The objections to the regularity of the attachments in this case are equally as lacking in merit as they are highly technical and astute.

We respectfully submit that the attachments secured in this action can be and ought to be sustained and that an order be issued herein reversing the court below and remanding the cause to the District Court for further proceedings in accordance with law.

Respectfully submitted,

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APPENDIX A

Section 121 of the Ohio General Code:

"No banker, broker, cashier, director, teller, or clerk of a bank, banker or broker, or other person holding an official relation to a bank, banker, or broker, shall be competent to act as notary public in any matter in which such bank, banker, or broker is interested."

APPENDIX B

Section 11828 of the Ohio General Code:

"When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served."